Nos. 16-2297, 16-3162 & 16-3271

U.S. Court of Appeals for the Seventh Circuit

HOBBY LOBBY STORES, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner,

and

COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE,
Intervening Respondent.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, NO. 20-CA-139745

JOINT APPENDIX – VOLUME 2 OF HOBBY LOBBY STORES, INC. AND COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

RON CHAPMAN, JR.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
8117 Preston Road, Ste. 500
Dallas, Texas 75225
(214) 987-3800

Attorneys for Hobby Lobby Stores, Inc.

DAVID A. ROSENFELD
WEINBERG, ROGER & ROSENFELD, A Professional Corporation
1001 Marina Village Pkwy, Ste. 200
Alameda, California 94501
(510) 337-1001

Attorney for the Committee to Preserve the Religious Right to Organize

TABLE OF CONTENTS

Volume 1

Excerpts from Certified Administrative Record

s/Ron Chapman, Jr.
Ron Chapman, Jr.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
8117 Preston Road, Ste. 500
Preston Commons West
Dallas, Texas 75225
Tel: 214-987-3800
Fax: 214-987-3927
ron.chapman@ogletreedeakins.com

Christopher C. Murray
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Cir., Ste. 4600
Indianapolis, Indiana 46204
Tel: 317-916-1300
Fax: 317-916-9076
christopher.murray@ogletreedeakins.com

Attorneys for Hobby Lobby Stores, Inc.

s/David A. Rosenfeld (by consent)
David A. Rosenfeld
WEINBERG, ROGER & ROSENFELD, A Professional Corporation
1001 Marina Village Pkwy, Ste. 200
Alameda, California 94501
Tel: (510) 337-1001
Fax: (510) 337-1023
DRosenfeld@unioncounsel.net

Attorney for the Committee to Preserve the Religious Right to Organize

JOB #116

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	6/29	15:47	914153565156	EC--S	00′ 53″	003	OK
002		15:49	912124922501	EC--S	00′ 40″	003	OK
003		15:50	915103371023	EC--S	00′ 35″	003	OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HOBBY LOBBY STORES, INC.

and **Case 20-CA-139745**

THE COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

ORDER GRANTING GENERAL COUNSEL AND RESPONDENT'S JOINT MOTION TO SUBMIT STIPULATED RECORD TO THE ADMINISTRATIVE LAW JUDGE AND SETTING BRIEFING SCHEDULE

I. ORDER GRANTING JOINT MOTION

On June 2, 2015, the General Counsel and the Respondent submitted a joint motion to submit a stipulated record to the administrative law judge (stipulation and motion). This motion and stipulation included a stipulation of issues presented, signed by Respondent and General Counsel on June 1, and June 2, 2015, respectively, and a submission of joint exhibits and stipulation of facts signed by the Charging Party, Respondent and General Counsel on May 28, May 27, and June 2, 2015, respectively.

On June 3, I issued an order setting a deadline of June 17, 2015, for the Charging Party to file and serve its response to the joint motion and stipulation, including any objections, and setting a deadline of June 24, 2015, for the General Counsel and the Respondent to submit responses. I have received and considered the Charging Party's objections to the proposed stipulated record, the General Counsel and Respondent's respective reply briefs in response to the Charging Party's objections to the proposed stipulated record. For the reasons set forth below, the General Counsel and Respondent's joint motion is here by GRANTED.

Section 10(b) of the National Labor Relations Act (the Act) provides for the issuance of a complaint and notice of hearing based upon a timely filed charge. However, a charging party has no absolute right to an evidentiary hearing under Section 10(b) if there are no material issues of fact to be resolved. *NLRB v. Brush–Moore Newspapers*, 413 F.2d 809, 811 (6th Cir. 1969). Thus, the General Counsel, who has the primary responsibility for prosecuting cases before the NLRB, may enter into stipulations without the charging party's consent subject to the right of a charging party to introduce contrary evidence or adduce additional facts. *B.F. Goodrich*, 113 NLRB 152 (1955), enfd. sub nom, *UAW v. NLRB*, 231 F. 2d 237 (7th Cir. 1956), cert. denied

JD(SF)–36–15
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOBBY LOBBY STORES, INC.

and Case 20–CA–139745

THE COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE

Yasmin Macariola, Esq., for the General Counsel.

Frank Birchfield, Esq.,
Christopher C. Murray, Esq.,
for the Respondent.

David Rosenfeld, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, ADMINISTRATIVE LAW JUDGE. This case was tried based on a joint motion and stipulation of facts I approved on June 29, 2015. The charge in this proceeding was filed by the Committee to Preserve the Religious Right to Organize (the Charging Party) on October 28, 2014, and a copy was served by regular mail on Respondent, on October 29, 2014. The General Counsel issued the original complaint on January 28, 2015, and an amended complaint on April 9, 2015. Hobby Lobby, Inc. (the Respondent or Company) filed timely answers denying all material allegations and setting forth defenses.

On June 2, 2015, the General Counsel and the Respondent filed a joint motion to submit a stipulated record to the Administrative Law Judge (Joint Motion). The Charging Party did not join the Joint Motion. On June 3, I issued an order granting the Charging Party until June 17, to file a response to the Joint Motions, including any objections to it. On June 17, the Charging Party filed objections to the Joint Motion, and the General Counsel and the Respondent, replied

to the objections, respectively, on June 23 and 24. I issued an order granting the Joint Motion over the Charging Party's objections on June 29.[1]

The following issues are presented:

1. Whether the Respondent's Mandatory Arbitration Agreement (MAA) and related policies maintained by the Respondent, which requires employees, as a condition of employment, to waive their right to resolution of employment- related disputes by collective or class action violates Section 8(a)(l) of the National Labor Relations Act (the Act).

2. Whether the MAA maintained by the Respondent would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(l) of the Act.

3. Whether the Respondent's enforcement of the MAA through its motions to compel arbitration in *Jeremy Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California; and *Ortiz v. Hobby Lobby Stores*, Inc., 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California, violates Section 8(a)(l) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Oklahoma corporation with several stores throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products. The parties admit, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[1] The June 3, 2015, order is hereby admitted into the record as administrative law judge (ALJ) Exhibit 1, the Charging Party's June 17 response is admitted as ALJ Exhibit 2, the General Counsel's June 23 reply is admitted as ALJ Exhibit 3, and the Respondent's June 24 reply is admitted as ALJ Exhibit 4. The following abbreviations are used for citations in this decision: "Jt. Mot." for the General Counsel and Respondent's joint motion; "Jt. Exh." for the exhibits attached to the joint motion; "GC Br." for the General Counsel's brief; "R Br." for the Respondents' brief; and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

II. FACTS

The Respondent, Hobby Lobby, is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. It operates approximately 660 stores in 47 states.

The Respondent employs individuals in various job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers; craft designers; graphic & web designers; production artists; video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; packers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (Jt. Mot. ¶ 4(a) & ¶ 4(b).)

Upon commencing employment, all employees receive a copy of the Respondent's employee handbook. There are two different versions of the employee handbook—one for employees in California and one for employees outside of California. Employees must sign in receipt of the handbook and agree to be bound by its terms. The version applicable to employees in California states[2]:

> By my signature below, I acknowledge that I have received a copy of the Company's California Employee Handbook ("Employee Handbook"). I understand this Employee Handbook contains important information on the Company's policies, procedures, and rules. It also contains my obligations as an employee.
>
> I understand that this Employee Handbook replaces and supersedes any and all previous employee handbooks that I may have received, or agreements or promises made by any representative of the Company other than a Corporate Officer prior to the date of my signature below, and that I cannot rely upon any promises or representations made to me by anyone concerning the terms and conditions of my employment that are contrary to or inconsistent with this Employee Handbook, or any subsequent written modifications or revisions to this Employee Handbook posted on the Company's Employee Information Boards.
>
> I understand that my employment with the Company is conditioned upon the contents of this Employee Handbook. I further understand that, with the exception of the Submission of Disputes to Binding Arbitration section of this Employee Handbook and the Mutual Arbitration Agreement, the Company may alter, change, amend, rescind, or add to any policies, procedures, or rules set forth in this Employee Handbook from time to time with or without prior notice. I further understand that the Company will notify me of any material changes to this Employee Handbook, and that, by continuing employment after being so notified of such changes, I acknowledge, accept, and agree to such changes as a condition of my employment and continued employment.

[2] The acknowledgment of the handbook does not materially differ for employees outside of California for purposes of this decision.

I understand that the employment relationship between me and the Company is at-will. I am employed on an at-will basis, as are all Company employees, and nothing to the contrary stated anywhere in this Employee Handbook or by any Company representative changes my or any employee's at-will status. I am free to resign at any time, for any reason, with or without notice. Similarly, the Company is free to terminate my employment at any time, for any reason, or for no reason at all. I also understand that nothing in this Employee Handbook is to be construed as creating, whether by implication or otherwise, any legal or contractual obligations or restrictions upon the Company's ability to terminate me as an employee at-will, for any reason at any time. Further, no person, other than a Corporate Officer of the Company, may enter into any written agreement amending this at-will employment policy or otherwise alter the at-will employment status of any employee.

By my signature below, I acknowledge that I have read and understand the provisions of this Employee Handbook and agree to abide by all Company policies, procedures, practices, and rules.

Since at least April 28, 2014, the Respondent has maintained the MAA in its employee handbook. The MAA requires employees to waive resolution of employment-related disputes by class, representative or collective action or other otherwise jointly with any other person. Since at least April 28, 2014, the Respondent has required all of its employees to enter into the MAA in order to obtain and maintain employment with the Respondent. (Jt. Mot. ¶ 4(e) & ¶ 4(i).)

The MAA provides, in relevant part:

This Mutual Arbitration Agreement ("Agreement"), by and between the undersigned employee ("Employee") and the Company, is made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company 's mutual agreement to arbitrate as provided in this Agreement. Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company, its affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees, that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company (including without limitation, all Disputes involving wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute in tort or contract), shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed. Such arbitration shall be conducted pursuant to the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation, then in effect, before an arbitrator licensed to

practice law in the state in which Employee is or was employed and who is experienced with employment law. . . . The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party. Prior to submitting a Dispute to arbitration, the aggrieved party shall first attempt to resolve the Dispute by notifying the other party in writing of the Dispute. If the other party does not respond to and resolve the Dispute within 10 days of receipt of the written notification, the aggrieved party then may proceed to arbitration. The parties agree that the decision of the arbitrator shall be final and binding. Judgment on any award rendered by an arbitrator may be entered and enforced in any court having jurisdiction thereof.

This Agreement between Employee and Company to arbitrate all employment-related Disputes includes, but is not limited to, all Disputes under or involving Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Fair Credit Act, the Employee Retirement Income Security Act, and all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract. This Agreement shall not apply to claims for benefits under unemployment compensation laws or workers' compensation laws.

By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state; or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court. Company shall bear the administrative costs and fees assessed by the arbitration provider selected by Employee: either the American Arbitration Association or the Institute for Christian Conciliation. Company shall be solely responsible for paying the arbitrator's fee. Except for those Disputes involving statutory rights under which the applicable statute may provide for an award of costs and attorney's fees, each party to the arbitration shall be solely responsible for its own costs and attorney's fees, if any, relating to any Dispute and/or arbitration. Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

> Every individual who works for Company must have signed and returned to his/her supervisor this Agreement to be eligible for employment and continued employment with Company. Further, Employee's employment or continued employment will evidence Employee's acceptance of this Agreement. Employee acknowledges and agrees that Company is engaged in transactions involving interstate commerce, that this Agreement evidences a transaction involving commerce, and that this Agreement is subject to the Federal Arbitration Act. If any specific provision of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain binding and enforceable. This Agreement constitutes the entire mutual agreement to arbitrate between Employee and Company and supersedes any and all prior or contemporaneous oral or written agreements or understandings regarding the arbitration of employment-related Disputes. This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status.
>
> Employee and Company acknowledge that they have read this Mutual Arbitration Agreement, are giving up any right they might have at any point to sue each other, are waiving any right to a jury trial, and are knowingly and voluntarily consenting to all terms and conditions set forth in this Agreement.

(Jt. Exhs. I, J.) The MAA is also part of the application for employment with the Respondent. (Jt. Exhs. K, L.) It has its own signature requirement. The signed MAA is included in each new employee's "new employee packet" and is filed in the employee's personnel file. (Jt. Exhs. M–X.) During the period of December 18, 2010 to December 18, 2014, Respondent hired approximately 65,880 employees and re-hired approximately 6,324 employees for a total of approximately 72,204 recipients of the MAA. (Jt. Mot. ¶ 4(h).)

On December 3, 2013, the Respondent filed a motion in the United States District Court for the Eastern District of California to dismiss individual and representative wage-related claims a former employee had filed against it under California law, in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.). (Jt. Exh. Y; Jt. Mot. ¶ 5.) The Respondent moved, in the alternative, pursuant to the Federal Arbitration Act (FAA), to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Jt. Exh. Y.)

On April 17, 2014, the Respondent filed a motion seeking to dismiss a putative class action lawsuit filed by multiple employees alleging wage and hour claims against it under California law in *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). (Jt. Exh. Z; Jt. Mot. ¶ 5.) In the alternative, pursuant to FAA, the Respondent moved to compel individual arbitration under the MAAs signed by each named plaintiff. (Joint Ex. 2Z.) On June 13, 2014, the U.S. District Court for the Central District of California granted the Respondent's motion to compel individual arbitration under the MAA. *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments that the MAA was unenforceable under California law and under the National Labor Relations Act pursuant to the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013).

On October 1, 2014, the U.S. District Court for the Eastern District of California in the *Ortiz* case granted the Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc*., 52 F.Supp. 3d 1070 (E.D. Cal. 2015). The court considered the Board's decision in *D. R. Horton*, and concluded its reasoning conflicted with the FAA and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

III. Decision and Analysis

A. The MAA's Prohibition on Class and Collective Legal Claims

Complaint paragraphs 4(a), (c), (d), and 5 allege that, at all material times since at least April 28, 2014, the Respondent has maintained the MAA, which requires employees to waive their right to resolution of employment-related disputes by collective or class action, as a condition of employment, in violation of Section 8(a)(1) of the Act.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

1. Application of *D. R. Horton* and *Murphy Oil*

When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[3] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

Because the MAA explicitly prohibits employees from pursuing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1). The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D. R. Horton,* supra;[4] see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)(Section 7 protects employee efforts seeking "to improve working conditions through resort to

[3] The Charging Party argues that *Lutheran Heritage* should be overruled. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board.

[4] The Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct.

Deference and the Federal Arbitration Act, 128 Harv. L. Rev. 907 (January 12, 2015), provides a well-reasoned explanation as to why the Board's conclusion that collective and class litigation is protected Section 7 activity should be accorded deference by the courts.

administrative and judicial forums; *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton,* supra.; *Murphy Oil*, supra; See also *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *PJ Cheese Inc.*, 362 NLRB No. 177 (2015); *Leslie's Pool Mart, Inc*., 362 NLRB No. 184 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

The Respondent propounds numerous arguments as to why *D. R. Horton* and its progeny should be overturned.[5] (R Br. 6–48.) I am, however, required to follow Board precedent, unless and until it is overruled by the United States Supreme Court.[6] See *Gas Spring Co*., 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents International Union*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960)), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991). Applying the above-cited Board precedent, I find the MAA violates Section 8(a)(1).

Though the Board has made its ruling on the issue clear, I will address the Respondent's arguments that have not been as fully covered by previous decisions. The Respondent contends that a class action waiver does not abridge employees' right to seek class certification to any greater extent than an employer's filing an opposition to an employee's motion for class certification. Of course it does; the former precludes the right, the latter responds to it. And it is apparent the waiver gives the opposition teeth. The Respondent then adds the element of success to the employer's motion to secure its argument. Success of the employer's motion cannot be presumed, however. The Respondent's argument thus fails.

The Respondent also contends that the Board's decisions stand for the proposition that employees have the right to have certification decisions heard on their merits. The Board has made no such holding or suggestion. If, by way of the example cited in the Respondent's brief, the class representative misses a filing deadline, nothing in any of the Board's cases suggests a court must nonetheless decide class certification on the merits.

As to the Respondent's assertion that there is no basis in the NLRA, the Federal Rules, or case law for *D .R. Horton's* presumption that class procedures were created to serve any concerns or purposes under the NLRA, the Board has not relied on such concerns or purposes.

---

[5] Many of these arguments are in line with the dissents in *D. R. Horton* and *Murphy Oil*. Numerous Board and ALJ decisions have addressed the specific arguments raised by the Respondent and there is nothing I can add in this decision that has not already been addressed repeatedly.

[6] The Respondent contends that, because the Board did not petition for a writ of certiorari to challenge the Fifth Circuit's rejection of the relevant part of *D.R Horton*, and because that decision rests primarily on interpretation of a statute other than the NLRA, I should not be constrained by Board precedent. No authority was cited for this contention, however, and I therefore decline to stray from the Board's established caselaw on this point.

Two employees who together file charges with the Equal Employment Opportunity Commission (EEOC) about racial harassment are engaged in concerted activity about their working conditions, though the EEOC's charge processing procedures were certainly not created to serve any concerns or purposes under the NLRA. The EEOC's procedures, like class procedures in court, are one of many avenues available for concerted legal activity, regardless of the purposes those procedures were intended to serve.

The Respondent next appears to be arguing that employees can, albeit in vain, file putative class action lawsuits despite the MAA, suffer no adverse consequences for it, and therefore the MAA does not infringe on their rights. There need not be adverse consequences for non-adherence to the MAA for it to violate the Act. Moreover, the MAA on its face spells out adverse consequences for filing putative class actions. The MAA states, in relevant part:

> Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Thus, in addition to breaking an agreement with the employer not to sue as an express condition of continued employment, an employee who files a putative class action may be assessed with fees and damages.

The Respondent also contends that the Board in *D. R. Horton* misinterpreted the *Norris-LaGuardia Act* (NGLA) when determining it prohibits the enforcement of agreements like the FAA. The Board recently reaffirmed its position that the FAA must yield to the NLGA, stating

> The Board has previously explained why "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act. That conflict in no way depends on whether the agreement is properly characterized as a condition of employment. By its plain terms, the Norris-LaGuardia Act sweepingly condemns "*[a]ny* undertaking or promise . . . in conflict with the public policy declared" in the statute: insuring that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state."

On Assignment Staffing Services, supra, slip op. at 10 (Emphasis in original, internal citations and footnotes omitted.)

2. The MAA as an employment contract

The Charging Party also asserts that the FAA does not apply because there is no employment contract, citing to the Supreme Court's decisions in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 113–114 (2001), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 277 (1995).[7] The Charging Party points out that the MAA itself states, "[t]his Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status." The employees' at-will status is also set forth in the introductory paragraph of the employee handbook. (Jt. Exh. I p. 5; Jt. Exh. J p. 5.)

The Charging Party notes that the Respondent has not offered evidence or argument that a contract of employment has been created by virtue of the MAA in any of the states where it operates. Resolution of this issue would involve delving into each state's body of contract law.[8] Because it is not required to support my conclusion herein that the MAA violates Section 8(a)(1), I decline to undertake this enormous task, the legal aspects of which none of the parties have addressed in their briefs.

3. The MAAs and commerce

The Charging Party argues that there is no evidence the individual MAAs with the Respondent's employees affect commerce, and asserts that the activity of arbitration does not affect interstate commerce. This raises the fundamental question of what, in fact, is the "transaction involving commerce" the MAA evidences to bring it within the FAA's reach?

The FAA, at 9 USC § 2, applies to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . ." Specifically excluded, however, are

---

[7] The Charging Party also asserts that MAA, when coupled with the Respondent's confidentiality policy, solicitation policy, loitering policy, email usage policy, computer usage policy, and/or return of company property policy, provide other bases for finding it unlawful. I agree that these policies, when viewed in conjunction with the MAA, act as further barriers to employees discussing their arbitrations under the MAA and/or garnering support from fellow employees. The complaint, however, does not allege that any policy other than the MAA violates the Act, and therefore my conclusions are limited to the MAA. See *Penntech Papers*, 263 NLRB 264, 265 (1982); *Kimtruss Corp*., 305 NLRB 710, 711 (1991).

The Charging Party sets forth numerous other arguments, including the FAA's impact on other federal and state statutes, the rights of workers to organize under the Religious Freedom Restoration Act (RFRA), and the effect of the MAA on union representation. I have considered each argument in the Charging Party's brief. Because this case can be decided by applying the Board precedent discussed above, I do not address all of the Charging Party's arguments.

[8] For example, under Minnesota law, the disclaimer language in the MAA may negate the existence of a contract. See *Kulkay v. Allied Central Stores, Inc*., 398 N.W.2d 573, 578 (Minn.Ct.App.1986). By contrast, in *Circuit City*, the Court of Appeals for the Ninth Circuit determined the dispute resolution agreement at issue, with disclaimer language almost identical to the agreement at issue here, was an "employment contract." *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999); See also *Ashbey v. Archstone Property Management, Inc*., 2015 WL 2193178 (9th Cir. 2015).

"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC § 1. The Supreme Court in *Circuit City* interpreted this exclusionary provision, "any other class of workers engaged in foreign or interstate commerce," narrowly, and held it applied only to workers actually working in commercial industries similar to seamen and railroad employees. Relying on *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995),[9] the Court in *Circuit City* interpreted Section 2's inclusion provision, a "contract evidencing a transaction involving commerce," broadly, finding it was not limited to transactions similar to maritime transactions.[10] In line with these interpretations, most contracts of employment fall within the FAA's reach, regardless of whether the employees themselves are involved in any traditionally-defined commercial transactions as part of their work.

In *Allied-Bruce Terminix*, supra, the Supreme Court examined the phrase "evidencing a transaction" involving commerce and determined that "the transaction (that the contract 'evidences') must turn out, *in fact* . . . [to] have involved interstate commerce[.]" (emphasis in original). A prior Supreme Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words "involving commerce" as broadly as the words "affecting commerce,"[11] involved an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of Polygraphic Co.'s Vermont plant. The employment contract at issue contained a provision that in case of any dispute, the parties would submit the matter to arbitration by the American Arbitration Association.

[9] The Court in *Allied-Bruce* found that the term "involving" was the same as "affecting" and that the phrase "'affecting commerce' normally signals Congress' intent to exercise its Commerce Clause powers to the full." 513 U.S. at 273–275.

[10] Though I am bound by the majority's decision in *Circuit City*, I find the dissenting opinions, and in particular Justice Souter's explanation of why the Court's "parsimonious construction of § 1 of the . . . FAA . . . is not consistent with its expansive reading of § 2," more sound and compelling. Presumably the result of adherence to precedent, the phrase "contract evidencing a transaction involving commerce" is not seen as a residual phrase following the specific category of maritime transactions in § 2, but the phrase "any other class of workers engaged in foreign or interstate commerce" is seen as a residual phrase following the specific categories of seamen and railroad employees in § 1. This distinction supplied the Court's rationale for applying the maxim *ejusdem generis* to "any other class of workers engaged in foreign or interstate commerce" to support its finding that employment contracts are covered by the FAA. "Maritime transactions" is defined in § 1 by way of listing various transactional contracts, such as charter parties, bills of lading, and agreements relating to supplies and vessels. Applying *ejusdem generis*, the expansive definition given to the phrase "contract evidencing a transaction involving commerce," fails to give independent meaning to the term "maritime transaction."

[11] *Allied-Bruce Terminix*, supra, at 277.

The Supreme Court found the FAA did not apply because the company did not show that the employee, "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."[12]

5

[12] The agreement provided for the employment of Bernhardt as the superintendent of Polygraphic Co.'s lithograph plant in Vermont. Its terms stated:

"Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or it its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations [section 1448 et seq.]. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceedings or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted." 218 F.2d 948, 949–950 (2d Cir. 1955).

Here, the contract at issue is the MAA.[13] There is no other employment contract implicated in the complaint or the answer.[14] By virtue of the MAA, the employee and employer have transacted an agreement to resolve employment disputes through arbitration. What is analytically more difficult about the MAA and similar agreements, when compared with most contracts, is that the arbitration agreement itself is part of the consideration for the transaction. The agreement here states that the "Mutual Arbitration Agreement . . . is made in consideration for the continued at-will employment of the Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement."[15] (Jt. Exh. I p. 55; Jt. Exh. J p. 56.) Generally, when a contract is involved, the arbitration agreement is a means to solve a contract dispute, and the terms of the agreement spell out independent consideration. For example, in *Allied-Bruce Terminix*, consideration for the termite bond at issue was money. In *Buckeye Check Cashing*, individuals entered into "various deferred-payment transactions with . . . Buckeye . . . in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge." 546 U.S. at 440. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the arbitration agreement was part of an application to register with the New York Stock Exchange. In none of these cases was the agreement to arbitrate itself consideration in the "contract evidencing a transaction involving commerce."

The MAA's terms, including the "consideration" of the individual arbitral process, are not implicated until there is an employment dispute. In other words, an employment dispute is a condition precedent to performance under the MAA. In typical transactions, a dispute is not necessary for the terms of the agreement to be exercised. For example, in *Buckeye*, the check cashing company provided cash to the individuals as consideration for the individuals signing over their checks and paying a fee. These transactions could play out indefinitely without the arbitration agreement provision ever coming into play. If the individuals in *Buckeye* performed their end of the bargain by turning over their checks and the check cashing company sat idle, a dispute would arise. Conversely, there would be no need for the check cashing company to do anything if the individual never presented it with a check to cash. Not so here, if the employees' work is part of the consideration. At all times prior to the advent of a covered dispute and the invocation of a way to resolve it, the employer is continuing to employ the employee and the employee is continuing to perform work for the employer. Continued employment triggers no

[13] I have not been asked to decide whether the entire employee handbook is a contract, and make no findings on this point.

There is no evidence here of any contract setting forth payment, duties, etc. of the various employees' jobs, as in *Bernhardt*. This renders the interpretation in this decision narrower than in *Bernhardt* because I am not looking at a broader employment contract, with an agreement to arbitrate disputes embedded in it, and whether that contract has been breached based on the terms of that contract. Instead, I am looking at whether any employment dispute covered by the contract, here the MAA, evidences a transaction involving commerce.

[14] It strikes me as peculiar that the contract to arbitrate itself is the contract at issue to determine applicability of the FAA, rather than an external contract or agreement subject to an arbitration provision. In most cases, the arbitration agreement would kick in if there was a dispute as to performance under the terms of the agreement. Here, a dispute regarding performance under the terms of the MAA would concern whether the employee submitted a covered dispute to arbitration in line with the MAA, or breached the agreement by filing a lawsuit in court.

[15] Oddly, by this language the MAA is in part made in consideration for itself.

duty on the employer or the employee with regard to the MAA.[16] The employee deciding not to continue employment with the Respondent, without more, likewise triggers no duty under the MAA. It is difficult to see, therefore, how continued employment is part of the "transaction" the MAA evidences.

Simply put, the MAA is a contract about how employment disputes will be resolved. The "transactions" evidenced by the MAA are agreements to arbitrate any and all employment disputes. Yes, the MAA is a condition of employment, but its topic is not the work the employees will perform or the conditions under which they will perform it. An employer engaged in interstate commerce could require employees, as a condition of employment, to sign an agreement stating that they will sit with their coworkers for lunchtime on Tuesdays.[17] The topic of this agreement is not the employee's work duties or the employer's business, but rather who the employees will eat lunch with on Tuesdays. It certainly would seem a stretch to find that this agreement would be a "maritime transaction or a contract evidencing a transaction involving commerce."

As noted above, the MAA applies to all employees. As the Charging Party points out, some disputes covered by the MAA with some of these employees would likely affect commerce, and other minor disputes likely would not. Take the example of a security worker who walks a block to work (not across state lines) at the same Hobby Lobby store each day. It is hard to see how an individual arbitration, required by the MAA, about a disagreement over the timing of this security worker's lunch break evidences any transaction involving commerce. The fact that the employer is engaged in interstate commerce does not, in my view, render any individual agreement to arbitrate an employment dispute as a "contract evidencing a transaction involving commerce" because it is not the employer's business of producing and selling goods in interstate commerce comprising the "transaction" evidenced by the MAA. To interpret the FAA this broadly would finally stretch it to its breaking point.[18]

Even if the "transaction" the MAA contemplates is employment or continued employment under the MAA's terms, the individual agreements do not necessarily "evidence a transaction involving commerce." As in *Bernhardt*, not all of the Respondent's employees, while performing their duties, are "'in' commerce, . . . producing goods for commerce, or . . . engaging in activity that affect[s] commerce . . . ."

Consideration of the Supreme Court's decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), does not lead to a different finding. In *Citizen's Bank*, the Court stated,

---

[16] Moreover, as the Respondent asserts, employees who have filed class and/or collective lawsuits have not been disciplined, much less been terminated.

[17] Of course, there would be a clause stating that any disputes over this policy would be subject to arbitration.

[18] Many of the Supreme Court Justices, for example, believe the FAA was stretched too far when the Court determined it applied to state court claims. *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Justice O'Connor, joined by Justice Rehnquist, dissenting; See also *Allied-Bruce Terminex*, supra., Justice O'Connor concurring ; Justice Scalia dissenting; Justice Thomas, joined by Justice Scalia, dissenting. Others believe it was stretched too far when it was held to apply to employment contracts. *Circuit City,* supra, Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, dissenting; Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissenting.